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Nos. 89-1391 and 89-1392

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In the Supreme Court of the United States

OCTOBER TERM, 1989

DR. IRVING RUST, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

THE STATE OF NEW YORK, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Title X of the Public Health Services Act, which authorizes federal grants to support the provision of family planning services, provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. The implementing regulations prohibit Title X grant recipients from providing, within their Title X programs, abortions or abortion-related services, including counseling clients about abortion, referring them to facilities that provide abortions, or engaging in abortion-related advocacy. The question presented is whether those regulations violate Title X, the First Amendment rights of grantees and pregnant women, or the Fifth Amendment rights of pregnant women to terminate their pregnancy.

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OPINIONS BELOW

The opinion of the court of appeals (89-1391 Pet. App. 35a-67a)[1] is reported at 889 F.2d 401. The opinion of the district court (Pet. App. 9a-32a) is reported at 690 F. Supp. 1261.

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[1] Hereinafter "Pet. App." will refer to the petition appendix in No. 89-1391, which applies to both cases.

JURISDICTION

The judgment of the court of appeals (Pet. App. 68a-69a) was entered on November 1, 1989. On January 11, 1990, Justice Marshall extended the time to file a petition for certiorari to and including March 1, 1990, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title X of the Public Health Services Act[2] authorizes the Secretary of Health and Human Services to make grants nationwide to public and private nonprofit entities to establish "projects"[3] that "shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. 300. Congress provided, however, that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. 300a-6. That restriction was intended to ensure that Title X funds would "be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities." H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970).

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[2] Title X was added to the Public Health Services Act by the Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504, 42 U.S.C. 300 to 300a-8 (1982 & Supp. V 1987).

[3] "Title X project" and "Title X program" are used by the Secretary interchangeably, and can mean either the "program which is approved by the Secretary for support" or the "coherent assembly of plans, activities and supporting resources contained within an administrative framework." 42 C.F.R. 59.2. Moreover, while Title X services may be delivered through a family planning clinic, the Title X project may be only one aspect of that clinic.

2. The initial implementing regulations required that grantees "not provide abortions as a method of family planning" in Title X programs. 42 C.F.R. 59.5(9) (1972); see 38 Fed. Reg. 18,465 (1973); 45 Fed. Reg. 37,436 (1980). The statute was interpreted, however, to allow grantees to provide "non-directive counseling" about pregnancy termination, including information about and referral for abortions through the provision of the names, addresses, and telephone numbers of abortion providers. Pet. App. 42a-43a.

In 1988, in order to bring the Title X program more in line with the text and purposes of 42 U.S.C. 300a-6, the Secretary adopted new regulations that altered the counseling and referral policy; the regulations also clarified preexisting limitations on abortion-related advocacy and requirements of physical and financial separation from the performance of abortion-related activities. See 53 Fed. Reg. 2922, 2923-2925 (1988). The new regulations, as the court below observed, prohibit Title X grantees from engaging in "those activities that 'assist' a woman to obtain an abortion, while not interfering with the right to receive information about abortion from sources other than Title X projects." Pet. App. 43a. More specifically, the regulations attach three major conditions to the grant of federal funds for Title X projects.

First, a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 C.F.R. 59.8(a)(1). Title X projects may not counsel their clients about abortion as a family planning method whether such counseling is neutral, favors, or opposes abortion. Nor may a Title X project assist women in procuring an abortion for family planning purposes by providing them with referrals to entities that provide abortions or abortion-related services as their principal business. 42 C.F.R. 59.8(a)(2). At the same time, the regulations do not forbid

a Title X project from making clear to its clients that the project only provides preventive family planning services and does not assist in procuring abortions and abortion-related services.

Second, the so-called "program-integrity" regulations clarify the required degree of physical and financial separation between Title X projects and the other parts of a grantee's organization that might provide abortion services. The regulations call for a case-by-case determination of "objective integrity and independence" based upon (but not limited to) factors such as (a) the existence of separate accounting records; (b) the degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; (c) the existence of separate personnel; (d) the extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent. 42 C.F.R. 59.9. See Pet. App. 45a. There are no other restrictions in that Section on the relationship between a grantee's Title X project and its other activities, or on the activities of parent or affiliate organizations.

Third, the regulations codify and clarify the preexisting prohibition on abortion advocacy, and give examples of activities so proscribed, such as lobbying and using legal action to make abortion available as a method of family planning. Pet. App. 45a-46a.[4]

[4] (1) Lobbying for the passage of legislation to increase in any way the availability of abortions as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

The regulations' restrictions concern only abortion as a method of family planning. The regulations require a Title X project to refer a client for necessary treatment in a medical emergency, even when this treatment would normally involve an abortion. See 42 C.F.R. 59.8(a)(2) and (b)(2). But the principal focus of Title X's subsidies is "[f]amily planning," which is defined as "the process of establishing objectives for the number and spacing of one's children and selecting the means by which these objectives may be achieved." 42 C.F.R. 59.2. Thus, the medical services that Title X supports also do not include post-pregnancy services, such as prenatal and obstetric care. Accordingly, if a client of a Title X project is diagnosed as pregnant and no medical emergency is present, she must be referred to an entity that will offer prenatal pregnancy care.[5] The regulations do not attempt to constrict the information that a Title X client might receive at a prenatal care facility; the fact that a pregnant woman received counseling about abortion as a method of family planning at the prenatal care facility would not, in itself, violate the regulations. But a Title X project may not employ prenatal care referrals as a means of circumventing Title X's restriction by "weighing the list of referrals in favor of health care providers which perform abortions, by including on the list * * * health care providers whose principal business is the provision of abortions, * * * or by 'steering' clients to providers who offer abortion as a method of family planning." 42 C.F.R. 59.8(a)(3).

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

42 C.F.R. 59.10(a).

[5] The client must "be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." 42 C.F.R. 59.8(a)(2).

Moreover, the new regulations apply only "to the use of Title X project funds." 42 C.F.R. 59.10(a).[6] Any abortion-related services provided or activity engaged in by a grantee or its affiliates outside of its Title X project has no effect on the grantee's Title X funding.

3. After the regulations had been promulgated, but before they had been applied, these consolidated actions were brought, challenging the facial validity of the regulations on statutory and constitutional grounds. The district court upheld the regulations against both statutory and constitutional challenges, Pet. App. 9a-32a, and the court of appeals affirmed by a divided vote, *id.* at 35a-67a.

The court of appeals rejected as "highly strained" petitioners' argument that Title X forbids only the provision of abortions by Title X projects. Pet. App. 47a. The court found that the new regulations were based on a natural construction of the statute, *ibid.*, and were "fully consistent with" both "the language and history of Title X," Pet. App. 51a. The court also held that the regulations do not "impermissibly burden a woman's privacy right to an abortion" under *Roe* v. *Wade*, 410 U.S. 113 (1973). Pet. App. 53a. The court determined that the regulations do not place any "affirmative legal obstacle" in the path of a woman who might seek an abortion, and that therefore petitioners' claims

[6] Title X project funds are defined to include "grant funds, grant-related income or matching funds." Grant funds are those provided by the government; matching funds are the funds that must be supplied to the project by the grantee to cover the balance of expenses. Grant-related funds are funds generated by the Title X project through, for example, patient charges or reimbursement from collateral sources. The terms of the grant specify how grant-generated income may be used. The Secretary may allow these funds to be applied toward the 10% matching fund requirement; to be, in effect, returned to the government; or to be used to expand the Title X project. See, *e.g.*, 45 C.F.R. 74.42(c)-(e).

are "clearly refute[d]" by *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040 (1989). Pet. App. 55a.

The court also ruled that the limitations on the use of project funds for abortion counseling, referral, or advocacy do not violate the First Amendment. The court noted that, under *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), the government has no obligation to subsidize even the "exercise of fundamental rights," including "speech rights." Pet. App. 56a. In addition, the court of appeals reasoned that the regulations do not "condition receipt of a benefit on the relinquishment of constitutional rights," since grantees and their employees "remain free to say whatever they wish about abortion outside the Title X project." *Id.* at 57a. Finally, the court held that the regulations "do not facially discriminate on the basis of the viewpoint of the speech involved." *Id.* at 59a. "Argumentation pro or con as to the advisability of an abortion for a particular woman is neither required nor authorized. * * * Nor do the regulations in any way suggest that Title X funds may be used for public anti-abortion advocacy." *Ibid.*[7]

ARGUMENT

Although we believe that the Second Circuit's decision is correct, we agree with petitioners that review by this Court is warranted. The decision in this case conflicts in several respects with the First Circuit's recent decision in *Massachusetts* v. *Secretary of HHS*, No. 88-1279 (Mar. 19, 1990) (en banc), *reprinted at* Pet. Supp. App. 1sa-49sa; the

[7] Judge Kearse dissented in part. She concluded that the new abortion counseling and referral regulations were arbitrary and capricious, and also violated the First and Fifth Amendments. Pet. App. 62a-67a. She did not conclude that the other portions of the regulations were invalid.

Solicitor General has authorized the filing of a petition for a writ of certiorari seeking review of the judgment of the First Circuit in that case.[8] The Second Circuit upheld the regulations in their entirety, rejecting petitioners' arguments that the regulations exceed the Secretary's authority under Title X and that the regulations violate the First and Fifth Amendments. Similarly, the First Circuit ruled that the regulations do not exceed the Secretary's authority under Title X, with the exception of the so-called "program integrity" regulations, which the First Circuit held invalid under the statute. But the First Circuit went on to hold that the regulations as a whole violate the First and Fifth Amendments.[9]

Accordingly, in view of the plain conflict among the circuits and the importance of the questions presented, we believe that review by this Court is appropriate.

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[8] The questions at issue in this case are also pending before the Tenth Circuit on appeal from a district court decision invalidating the Secretary's regulations on statutory and constitutional grounds. *Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. 1465 (D. Colo. 1988), appeal pending, No. 88-2251 (10th Cir.). The regulations were upheld in part and invalidated in part on constitutional grounds in *West Virginia Ass'n of Community Health Centers, Inc.* v. *Sullivan*, CA No. 2:89-0330 (D. W. Va. Mar. 1, 1990), appeal pending, No. 90-2366 (4th Cir.).

[9] The First Circuit further held that the invalid portions of the regulations were not severable from the valid portions. Pet. Supp. App. 42sa-44sa. The Second Circuit had no occasion to consider that issue, given its ruling upholding the regulations.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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